

IN THE  
**Supreme Court of the United States**

October Term, 1977

No. 77-587

JEANNE HARR and L. J. HARR for and on behalf of  
themselves and all others similarly situated,

*Petitioners,*  
v.

PRUDENTIAL FEDERAL SAVINGS AND  
LOAN ASSOCIATION,

*Respondent.*

L. J. HARR, JEANNE HARR, LAWRENCE J.  
ECHOHAWK, ED FULTON, DIANE FULTON, DON  
HUTCHISON, C. GERALD PARKER, DONALD  
DREW, CARRIE DREW, and DOUGLAS McGRÉGOR,

*Petitioners,*  
v.

FEDERAL HOME LOAN BANK BOARD,  
an agency of the United States,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

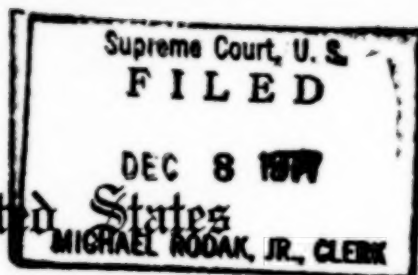
BRIEF OF PRUDENTIAL FEDERAL SAVINGS  
AND LOAN ASSOCIATION IN OPPOSITION

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December 1977



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OPINIONS BELOW

The Petition for Writ of Certiorari filed herein re-  
quests review of two related decisions of the United States  
Court of Appeals for the Tenth Circuit:

*Harr v. Prudential Federal Savings and Loan Association*, 557 F.2d 751 (10th Cir. 1977) [Pet. App. A-3 to A-10];<sup>1</sup> and

*Harr v. Federal Home Loan Bank Board*, 557 F.2d 747 (10th Cir. 1977) [Pet. App. A-11 to A-18].

Hereinafter, the two actions underlying these decisions shall be referred to as the *Prudential* case and the *Bank Board* case, respectively.

The Court of Appeals' decision in the *Prudential* case affirmed an unreported order of the United States District Court for the District of Utah (Pet. App. A-19 to A-20), dismissing for want of subject matter jurisdiction, a complaint filed by petitioners challenging Prudential Federal Savings and Loan Association's plan of conversion from a federally-chartered *mutual* savings and loan association to a federally-chartered *stock* savings and loan association, which had previously been approved by the Federal Home Loan Bank Board.

The Court of Appeals' decision in the *Bank Board* case dismissed as unmeritorious a Petition for Review of the Order of the Federal Home Loan Bank Board (Pet. App. A-21 to A-24) approving Prudential's plan of conversion.

### JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

The decisions of the Court of Appeals in both the *Prudential* case and the *Bank Board* case were entered on June 27, 1977. Timely petitions for rehearing and suggestion for rehearing *en banc* were denied on July 22, 1977 (Pet. App. A-1 to A-20). Petition for writ of certiorari was filed on October 20, 1977. On November 9, 1977, the

<sup>1</sup>"Pet. App." refers to petitioners' appendix. "Pet." refers to the petition for writ of certiorari.

Court granted this respondent's motion for an extension of time within which to file its responsive brief, extending the response period through December 9, 1977.

### STATUTE INVOLVED

The statutory provisions herein involved are Sections 402(j)(4) and 408a(k) of the National Housing Act, which provide in pertinent part:

12 U.S.C. § 1725(j)(4) (1977 Pocket Part):

(4) Any aggrieved person may obtain review of a final action of the Federal Home Loan Bank Board or the Corporation which approves, with or without conditions, or disapproves a plan of conversion pursuant to this subsection *only* by complying with the provisions of subsection (k) of section 1730a of this title . . . (emphasis added)

12 U.S.C. § 1730a(k):

(k) Any party aggrieved by an order of the Corporation . . . may obtain review of such order by filing in *the court of appeals of the United States* . . . a written petition praying that the order of the Corporation be modified, terminated, or set aside . . . upon the filing of such a petition, such court shall have jurisdiction, which upon the filing of the record shall be *exclusive*, to affirm, modify, terminate, or set aside, in whole or in part, the order of the Corporation . . . The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section 1254 of Title 28. (emphasis added)

### QUESTION PRESENTED

Whether a person challenging the approval, by the Federal Home Loan Bank Board, of a plan, submitted by a federally-chartered savings and loan association,

to convert from a mutual to a stock form of organization, may circumvent the exclusive and statutorily-mandated review procedure of 12 U.S.C. §1725(j)(4), by inaccurately labelling the challenge as a securities class action.

## STATEMENT OF THE CASE

### A. *The Parties to this Action.*

Petitioners are individual depositors and borrowers of the respondent, Prudential Federal Savings and Loan Association ("Prudential"), a federally-chartered savings and loan institution, which is exclusively chartered, organized, supervised and regulated, pursuant to Section 5(a) of the Home Owners' Loan Act of 1933, as amended (12 U.S.C. §1464(a)), by the respondent, Federal Home Loan Bank Board ("Bank Board"), an independent agency of the executive branch of the United States government, 12 U.S.C. § 1437(b). Pursuant to 12 U.S.C. § 1725, the Bank Board also operates and directs the Federal Savings and Loan Insurance Corporation ("FSLIC"), an independent agency and instrumentality of the United States, 12 U.S.C. §§ 1437(b), 1725(c) and 1730k(1), which insures the savings accounts of all federal savings and loan associations, and all qualified state savings and loan institutions which apply, under 12 U.S.C. § 1726. The FSLIC likewise exercises regulatory and supervisory authority over insured savings and loan institutions such as Prudential. 12 U.S.C. § 1730.

### B. *The Historical Setting.*<sup>2</sup>

Under the Home Owners' Loan Act of 1933, as originally enacted, all *federal* savings and loan institutions

<sup>2</sup>An analysis of the administrative and legislative history surrounding Prudential's conversion application is contained in Leibold & Wilfand, "The Conversion Process, Mutual to Stock Savings and Loan Associations," 30 Bus. Law. 129 (Nov. 1974).

were required to be "mutual" in form. Pursuant to a later amendment to the Act, however, the Bank Board was given authority to approve applications by *federal* savings and loan associations to convert to *state*-chartered *stock* institutions in those states which allowed savings and loan institutions to be chartered as such in the first instance. Section 5(i) of the Act, as amended, provides:

... [A]ny association chartered as a Federal savings and loan association ... may convert itself into a State institution upon an equitable basis, subject to approval, by regulations or otherwise, by the Federal Home Loan Bank Board and by the Federal Savings and Loan Insurance Corporation. ... 12 U.S.C. 1464(i).

On December 5, 1963, however, the Bank Board imposed an administrative moratorium on all conversions of federal savings and loan associations into state-chartered stock associations, in order to extensively study the matter of conversions. (C.A. Rec. 52.)<sup>3</sup>

The Bank Board's moratorium lasted, as a practical matter, from December 5, 1963, until July 26, 1972, when the Bank Board issued the following public announcement:

The Federal Home Loan Bank Board, has decided as part of its continuing study of conversions, it would accept applications from Federal and state-chartered mutual savings and loan associations desiring to convert into state-chartered stock associations. The purpose of the study would be to permit the Board to obtain additional information relevant to the possible termination of its "moratorium" on conversions of mutual associations into state-chartered stock form. It would also make it possible for the Board to act upon the applications at an early date if and when a decision is made to terminate the conversion moratorium. The Board

<sup>3</sup>"C.A. Rec." refers to the record before the Court of Appeals in the *Bank Board* case, a copy of which has been lodged in this Court.

also stated that it has set the close of business *July 13, 1972*, or earlier as the new record date for plans of conversion from mutual to stock form. (emphasis added)

The Bank Board also announced on July 26, 1972, that close of business July 13, 1972, *was the latest distribution record date the Bank Board would approve for mutual-to-stock conversion plans.* (C.A. Rec. 8-46.)

On August 4, 1972, Prudential's Board of Directors unanimously adopted, and recommended to the members of the association, a plan to convert the association into a state-chartered savings and loan institution having permanent reserve guaranty stock. The plan of conversion was filed with the Bank Board on August 6, 1972, and written public notice of the plan was given on August 10, 1972. Pursuant to the Bank Board's announcement, Prudential's plan provided for conversion to a stock association through the "free distribution" of stock to its depositors who had savings accounts as of July 13, 1972.

Prudential's application thereafter became enmeshed in administrative, judicial and legislative proceedings which focused on the procedures to be followed in approving and implementing mutual-to-stock conversions.

First, Congress passed Public Law 93-100, 87 Stat. 342, signed August 16, 1973, amending section 402 of the National Housing Act, 12 U.S.C. § 1725, by adding a new subsection (j), imposing a *legislative* moratorium on mutual-to-stock conversions until June 30, 1974. There was, however, written into that legislation, an exception giving the Bank Board authority to approve a limited number of conversion applications, including Prudential's, which had been filed with the Bank Board before May 23, 1973.

On February 28, 1974, the Bank Board, contrary to its previously effective regulations (and proposed modifications thereof), adopted revised regulations which prohibited "free stock" distribution plans except as expressly permitted by Congress. 12 C.F.R. 563b.

Finally, on October 28, 1974, the Congress enacted P.L. 93-495, 88 Stat. 1503, amending Section 402(j) of the National Housing Act, 12 U.S.C. § 1725(j) to permit a limited number of "experimental" mutual-to-stock conversions prior to June 30, 1976. The Act further authorized, for the first time, the conversion of federal mutual savings and loan associations to *federal* stock savings and loan associations. 12 U.S.C. § 1725(j)(3).

P.L. 93-495 was the product of considerable study, extensive hearings and intense debate prior to its enactment. Because Prudential's conversion plan was one of a very few then pending before the Bank Board, it was *specifically* subjected to intense scrutiny throughout the Congressional consideration of P.L. 93-495. After thorough examination of the problems inherent in such conversion plans, Congress directed the Bank Board:

. . . to process to final determination any application submitted for filing prior to May 22, 1973, . . . with further *proviso* that, with respect to a plan of conversion of any such application which, before May 22, 1973, has given written public notice to its accountholders of adoption of a plan of conversion or has obtained waiver forms from substantially all of its new accountholders subsequent to the giving of such notice, such plan need not require payment for stock distributed to accountholders as of a record date prior to the date of such notice. (National Housing Act, as amended, § 402(j)(2), 12 U.S.C. 1725(j)(2), 88 Stat. 1504.)

The proviso cited above related specifically to Prudential, for Prudential had given written public notice to its account holders on August 10, 1972, of the adoption of a plan of conversion, and under the plan as submitted to the Bank Board, distribution was to be made on the basis of a record date prior to May 22, 1973, i.e., July 13, 1972. As explained more fully hereinafter, Prudential could not lawfully have proceeded with its free stock distribution conversion plan unless it held to that record date, or some record date prior to the August 10, 1972, public notice of adoption of its plan of conversion. Furthermore, Prudential had obtained waiver forms from substantially all of its new account holders subsequent to the giving of such notice. Thus, Prudential met *all* the requirements of the new law permitting a "free" stock conversion under the special "grandfather" clause to P.L. 93-495. As the Senate Committee report on the 1974 amendments to the National Housing Act explained:

Under the language adopted by the Committee, those associations which (1) had submitted applications with the Board prior to May 22, 1973, and (2) had given either written public notice to their account holders or obtained waiver forms from substantially all of its new account holders that such a plan of conversion had been adopted, would be permitted to convert under a procedure which allows for the free distribution of stock to its depositors. *It is the Committee's understanding that there are at least three associations which may so qualify. They are: First Federal Savings and Loan Association of Phoenix, Arizona; Prudential Federal Savings of Salt Lake City, Utah; and Tucson Federal Savings and Loan Association of Tucson, Arizona. (emphasis added)*

Each of these associations would be allowed to convert under the free distribution procedure. These associations had taken certain public actions,

provided for in this section, regarding plans of conversion adopted by them and submitted to the Board prior to May 22, 1973. *These public actions have given rise to reliance and expectations on the part of the account holders of those associations, and the Committee does not believe it is appropriate for the Congress to frustrate these expectations. (emphasis added) (Senate Committee on Banking, Housing and Urban Affairs, Rpt. No. 93-902, 93d Cong. 2d Sess., Page 5 (June 4, 1974).)*

Congress had thus specifically considered the Prudential conversion plan during its deliberations; and the proviso of Section 402(j)(2) was clearly designed to cover Prudential's conversion application.

Congress, therefore, mandated in the 1974 amendments to the National Housing Act that if Prudential was to proceed with its planned free stock conversion, a record date of July 13, 1972, or earlier, was required. The Senate Committee on Banking, Housing & Urban Affairs actually encouraged Prudential's conversion indicating that the three "grandfathered" conversions would "offer Congress a further opportunity to examine what occurs when savings and loan associations are allowed to convert under a free distribution procedure." (S. Rpt. No. 93-902, *supra* at 4). Prudential was thus allowed by Congress to proceed with its plan so that Congress and the Bank Board could study the effects of that conversion and the effectiveness of existing conversion mechanisms.

Public Law 93-495 further provided that:

Any aggrieved person may obtain review of a final action of the . . . Board . . . which approves, with or without conditions, or disapproves a plan of conversion . . . *only* by complying with the provisions of subsection (k) of section 1730a of this

title [12 U.S.C. 1730a(k)] within the time limit and in the manner therein prescribed. . . . 12 U.S.C. 1725(j)(4). (emphasis added)

Congress thus incorporated by reference the review procedure of 12 U.S.C. 1730a(k), making it applicable to review of a final action of the Bank Board on conversion plans. Section 1730a(k) of Title 12, vests jurisdiction to review such agency orders in the *United States Courts of Appeals*, "which [jurisdiction] upon the filing of the record *shall be exclusive*, to affirm, modify, terminate, or set aside, in whole or in part, the order of [the Board] . . . ." (emphasis added)

Finally, P.L. 93-495 amended Section 12(i) of the Securities Exchange Act of 1934, 5 U.S.C. 781(i), to transfer administration and enforcement of the registration provisions of that Act to the Bank Board with respect to securities issued by all FSLIC-insured savings and loan institutions.

Following enactment of P.L. 93-495, Prudential revised its conversion plan to avail itself of the new statutory provision allowing retention of its federal charter following conversion. It further conformed its application precisely to the Bank Board's regulations for free stock conversion plans utilizing the statutorily-mandated distribution record date of July 13, 1972. *See*, 12 C.F.R. 563b.3(c). Prudential published notice of the revised plan on August 15, 1975, in accordance with Bank Board regulations, 12 C.F.R. 563b.4(b), inviting "written comments, including objections" to the plan. (C.A. Rec. 383-388). No objections to the proposed conversion plan were filed by members of the association, however.

Subsequently, on December 19, 1975, the Bank Board issued an Order approving Prudential's conversion application. (Pet. App. A-21 to A-24).

On January 16, 1976, Prudential mailed notice to its members of a special meeting on March 5, 1976, to vote on the conversion plan, together with proxy materials explaining the conversion plan in detail.

At the meeting on March 5, 1976, association members approved the conversion plan by a majority of the total outstanding votes; consequently, in accordance with Bank Board regulations, 12 C.F.R. 563b.6(d), Prudential became a federally-chartered stock association.

#### C. *The Prudential Plan.*

Prudential's conversion plan, as revised in 1975, following enactment of P.L. 93-495, provided for the issuance of 2,552,000 free shares of nonassessable common stock, with a par value of \$1 per share, to depositors of record as of July 13, 1972, with one share to be issued for each \$100 in savings balances as of that date.

The issuance of free stock to Prudential's directors and principal officers, however, was to be based on their savings account balances as of July 20, 1970, the date Prudential's directors first considered the plan of conversion, if the July 20, 1970, balances were less than their savings balances as of July 13, 1972 (C.A. Rec. 992, 995).

#### D. *Proceedings in the Courts Below.*

On January 27, 1976, eleven days after Prudential mailed notice to its members of the special meeting to vote on the conversion plan, petitioners filed a class action complaint in the United States District Court for the District of Utah (the *Prudential* case), asking for an injunction blocking the Prudential conversion.

The complaint alleged that the conversion *plan* was part of a conspiracy by the directors to benefit themselves and the officers, that the *plan* was unfair and deceptive, that the proxy materials were deceptive, that the Bank Board's regulations had been disregarded, and that Rule 10b-5 of the Securities and Exchange Commission had been violated (Pet. App. A-4).

While the complaint, on its face, alleged certain violations by Prudential of the securities laws, petitioners' counsel explained at oral argument in the district court that the petitioners primarily objected to the fairness of the eligibility record date for free stock distribution, since they had either opened new accounts or increased their deposits after the record date. The specific relief being requested by petitioners was judicial amendment of the *plan* in order to increase the benefits accruing to them from the conversion.<sup>4</sup>

On February 11, 1976, a hearing was held in the United States District Court for the District of Utah on: (1) Plaintiff's Motion for Temporary Restraining Order and for Order to Show Cause Why a Preliminary Injunction Should Not Be Issued; and on (2) Defendant's Motion to Dismiss. After considering the pleadings and other papers on file with the Court and hearing oral arguments of counsel, the District Court made the *factual determination* that the plaintiff's allegations of securities violations were more form than substance, and that the action was in reality a challenge to the fairness and equity of Prudential's conversion plan which had been approved by the Bank Board. On the basis of that *factual determination*, the District Court denied plaintiffs' motion and

<sup>4</sup>See, *Harr v. Prudential Federal Savings and Loan Association*, Civil Action No. C-76-78 (D. Utah), Reporter's Transcript of Hearings on Motions, February 11, 1976, pp. 21-22. This transcript is part of the record in the *Prudential* case.

dismissed the complaint for want of subject matter jurisdiction under Sections 402(j)(4) and 408a(k) of the National Housing Act, 12 U.S.C. §§ 1725(j)(4) and 1730a(k) which provide for exclusive review in the United States Courts of Appeals of challenges to Bank Board-approved conversion plans.

Petitioners appealed the decision to the U.S. Court of Appeals for the Tenth Circuit, which affirmed the district court's decision stating:

... From the references to the basis for the claim which is described above and from the issues presented as described in plaintiffs' brief, we must hold that the cause of action, no matter how otherwise described, must in the first instance be a challenge to the approval by the Bank Board of the plan of conversion, and the consideration of the proxy materials. *It is "The Plan" itself which is the real basis for the arguments advanced here by plaintiffs.* The attempted reliance on Rule 10b-5 is at best a secondary or derivative position. It is based on the consequences or impact of the plan on plaintiffs. . . . Pet. App. A-7. (emphasis added)

Contemporaneous with the filing of its appeal from the District Court's order in the *Prudential* case, petitioners also filed a Petition for Review of the Bank Board's Resolution No. 75-1164 (Pet. App. A-21 to A-24) approving Prudential's conversion plan, in the United States Court of Appeals for the Tenth Circuit on February 20, 1976, (the *Bank Board* case). Petitioners argued that the use of the July 13, 1972 eligibility record date was inequitable to persons who opened accounts or increased the amount of their deposits after that date, that the conversion plan's provision for "free" distribution of stock was improper, and that the proxy materials which the Bank Board had authorized were misleading. (Pet. App. A-13.)

The Court of Appeals unanimously rejected these arguments, however, finding that there was no abuse of agency discretion in approving Prudential's plan, that the July 13, 1972, record date "was mandated by Congress for this conversion" (Pet. App. A-15), that the free distribution of Prudential's stock had been specifically authorized by statute (Pet. App. A-15), and that in the context of its review of the Bank Board's order, the Court of Appeals had found no omission or misleading statement in the proxy materials sufficient to warrant judicial modification of the plan. (Pet. App. A-17.)

It is against the backdrop of this long and extensive history of legislative, executive and judicial scrutiny and approval of Prudential's conversion plan, that petitioners now ask this Court to grant certiorari to further review its "fairness and equity."

### ARGUMENT

Certiorari should be denied in these cases. The decisions of the United States Court of Appeals for the Tenth Circuit in the *Prudential* and *Bank Board* cases are correct, are consistent with applicable statutory authority, previous decisions of this Court, and the decisions of other courts of appeals which have considered similar matters. Furthermore, the Prudential conversion, out of which the instant Petition for Certiorari arises, presents a unique situation, consequently, review by this Court is unwarranted.

Petitioners' arguments notwithstanding, the *only* issue presented by the decisions of the Court of Appeals below is whether a person challenging the approval, by the Federal Home Loan Bank Board, of a plan, submitted by a federally-chartered savings and loan association, to

convert from a mutual to a stock form of organization, may circumvent the exclusive and statutorily-mandated review procedure of 12 U.S.C. § 1725(j)(4), by *inaccurately labelling the challenge* as a securities class action.

### I. PETITIONERS' SO-CALLED SECURITIES CLASS ACTION AMOUNTED TO NOTHING MORE THAN A CHALLENGE TO THE EQUITABILITY OF PRUDENTIAL'S CONVERSION PLAN AS APPROVED BY THE BANK BOARD.

Petitioners' petition to this Court makes broad claim that the decisions below emasculated operative provisions of the federal securities laws. While it is true that the complaint filed in the *Prudential* case was grounded upon alleged violations of the federal securities laws, it was patently clear from arguments of petitioners' counsel and other matters of record that the real purpose of the lawsuit and the gravamen of petitioners' claims was to challenge the Bank Board's determination that the conversion plan of Prudential was in all respects fair and equitable. Petitioners' counsel, in addressing the district court, for instance, characterized the action as follows:

MR. NIELSON: If the Court please, this is here today on a motion of the plaintiffs in Docket Number C-76-28, for a temporary restraining order and an order to show cause why a preliminary injunction should not be issued. This case, just in a little nutshell, it has to do with the proposed conversion plan of Prudential Federal Savings and Loan Association from a mutual savings and loan association to a stock savings and loan association and to put it as succinctly as it might be possible to put it, I suppose the issue here has to do with whether or not approximately thirty million dollars in equities in that company are properly applied on the conversion plan. The plaintiffs allege that

since those equities are applied to all depositors prior to July 13th, 1972, to the exclusion of depositors after that date, that the people after that date are being discriminated against and that is the group that we purport to represent. (emphasis added)

Again later in the argument, in a colloquy with the Court it was stated as follows:

THE COURT: Well, you want to head this plan off.

MR. NIELSON: *We would like a fair plan.*

THE COURT: You would like to head this plan off.

MR. NIELSON: *We would like to see the plan amended in such a way that it protects —*

THE COURT: You would like to defeat the fifty percent voting for the plan.

MR. NIELSON: Your Honor, the issue is this simple. Assume the hypothetical situation —

THE COURT: No, I don't talk about hypothetical situations. We've got a very good lively, practical situation here.

MR. NIELSON: All right. We are here to present the practical situation. We represent a woman who had on deposit approximately \$1,000 before July of 1972, which is the conversion date. She will get some stock for that but as of today she has a great deal on deposit in excess of that amount for which she won't get anything.

[Reporter's Transcript of Hearings On Motions in District Court, Record on Appeal, *Prudential* case Volume I, A-2, 22.] (emphasis added)

Based on these and other representations of petitioners' counsel, and the language of the complaint itself, the District Court made a *factual determination* that the *purported* securities class action was in reality little more than a challenge to the fairness and propriety of Prudential's conversion plan, and that pursuant to 12 U.S.C. §1725 (j)(4), the District Court did not have subject matter jurisdiction to consider such a challenge to the merits of the Board-approved plan.

In the *Prudential* case, the Court of Appeals simply upheld that factual determination of the District Court.

In the *Bank Board* case, the Court of Appeals dismissed the petition for review, again based on *factual determinations* that the petitioners' challenges to the Prudential conversion plan and the proxy solicitation materials were without merit.

Petitioners totally misconceive the nature of the decisions of the Court of Appeals by suggesting that those decisions nullify private rights of action by account holders for allegedly false or misleading proxy materials, used in conjunction with a Bank Board-approved conversion plan. (Pet. 14-17.) As the Court of Appeals stated:

It must be assumed that the private remedies available under SEC 14A as to fraud also exist under the counterpart Bank [Board] Regulations. (Pet. App. A-5.)

The clear language of both opinions simply does not support the broad and sweeping generalities asserted by petitioners herein.

## II. THE COURT OF APPEALS DECISIONS ARE CORRECT.

### A. *The Prudential Decision.*

The law is well settled that when Congress has specifically provided a statutory procedure for review of an administrative order, that procedure is *exclusive*. This principle of administrative review has been affirmed repeatedly by this Court. In explaining the exclusivity of a judicial review procedure identical to the procedure dictated by 12 U.S.C. §§ 1725(j)(4) and 1730a(k),<sup>5</sup> The Court explained:

This view is confirmed by our cases holding that where Congress has provided statutory review procedures designed to permit agency expertise to be brought to bear on particular problems, those procedures are to be exclusive. [Citations omitted.] Congress has set out in the Bank Holding Company Act of 1956 a carefully planned and comprehensive method for challenging Board determinations. That action by Congress was designed to permit an agency, expert in banking matters, to explore and pass on the ramifications of a proposed bank holding company arrangement. To permit a district court to make the initial determination of a plan's propriety would substantially decrease the effectiveness of the statutory design. *Whitney Nat'l Bank v. Bank of New Orleans*, 379 U.S. 411, 420 (1965).

The Court in *Whitney National Bank* goes on to explain the sound basis for this principle:

That Congress has not expressly provided that the statutory procedure is to be exclusive does not require a different conclusion. . . . Moreover, it has enacted a specific statutory scheme for obtaining

<sup>5</sup>Compare, 12 U.S.C. 1848 with 12 U.S.C. 1730a(k).

review, and where Congress has directed such a procedure as that found in the Bank Holding Company Act of 1956, the doctrine of exhaustion of administrative remedies comes into play and requires that the statutory mode of review be adhered to notwithstanding the absence of an express statutory command of exclusiveness.

A rejection of this doctrine here would result in unnecessary duplication and conflicting litigation. Some opponents might participate before the Board; others might well wait for termination of the Board's activities and then sue in the district courts for an injunction accomplishing the same ultimate end. The different records, applications of different standards and conflict determinations that would surely result from such duplicative procedures all militate in favor of the conclusion that the statutory steps provided in the Act are exclusive. (*Id.* at 422.)

See also, *Callanan Road Improvement Co. v. United States*, 345 U.S. 507 (1953); *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938); *Texas & Pacific Railway Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907).

The *Whitney* decision is squarely on point and was dispositive of petitioner's appeal to the Tenth Circuit in the *Prudential* case. First, the 1974 amendments to the National Housing Act set forth a review procedure identical to the procedure of the Bank Holding Company Act considered by the Court in *Whitney*. Secondly, both administrative review procedures were designed by Congress to permit an agency, expert in savings and loan matters, "to explore and pass on the ramifications" of a proposed conversion plan, and to permit a district court to make determinations regarding the propriety of such a conversion plan "would substantially decrease the effectiveness of the statutory design." 379 U.S. at 420.

Furthermore, in designing the statutory review procedure of the National Housing Act for administratively approved conversion plans, the Congress went one step further. It explicitly provided that the statutorily-mandated review procedure was to be *exclusive*. Section 402(j)(4) of the National Housing Amendments of 1974 (12 U.S.C. § 1725(j)(4)) provides that review of an order of the Bank Board or FSLIC approving or disapproving a plan of conversion may be had "*only* by complying with the provisions of Section 1730a" of Title 12. Section 1730a(k) of Title 12 states in pertinent part:

Any party aggrieved by an order of the Corporation . . . may obtain a review of such order by filing in the court of appeals of the United States for the circuit in which the principal office of such party is located, or in the United States Court of Appeals for the District of Columbia Circuit, within thirty days after the date of service of such order, a written petition praying that the order of the Corporation be modified, terminated, or set aside. . . . Upon the filing of such a petition, such court shall have jurisdiction, which upon the filing of the record shall be *exclusive*, to affirm, modify, terminate, or set aside, in whole or in part, the order of the Corporation. . . . The judgment and decree of the court shall be final, except that the same shall be subject to the review of the Supreme Court upon certiorari as provided in section 1254 of Title 28. (12 U.S.C. 1730a(k).) (emphasis added)

Other courts of appeals, when confronted with this identical issue, have held, as the Tenth Circuit did below, that the district courts are without jurisdiction to issue an order enjoining the implementation of a Bank Board order issued pursuant to authority granted the Bank Board by the National Housing Act. In *Fort Worth National Corp. v. Federal Savings and Loan Insurance Corp.*,

469 F.2d 47 (5th Cir. 1972), the Fifth Circuit Court of Appeals reversed the decision of a district court granting a preliminary injunction on the ground that under Section 408(k) of the Act (12 U.S.C. 1730a(k)) the district court lacked subject matter jurisdiction. The court reasoned as follows:

By specifying that appeals under Section 1730a(k) were to be filed in the Court of Appeals, Congress expected to prevent conflicting rulings and duplicative proceedings that inevitably would result from permitting collateral attack of Corporation orders in the various district courts. Providing an *exclusive* method of review facilitates efficient and timely resolution of disputes concerning agency actions and promotes uniformity in judicial decisions. (*Fort Worth National Corp. v. Federal Savings and Loan Insurance Corp.*, *supra* at 52.)

See also, *First National Bank of St. Charles v. Board of Governors of the Federal Reserve System*, 509 F.2d 1004 (8th Cir. 1975); *Fidelity Financial Corp. v. Federal Savings and Loan Insurance Corp.*, 359 F. Supp. 324 (N.D. Cal. 1973). Cf. *Rigby v. Rasmussen*, 275 F.2d 861 (10th Cir. 1960).

The decision of the Court of Appeals for the Tenth Circuit in the *Prudential* case was clearly correct under applicable statutory authority, previous decisions of this Court, and decisions of other courts of appeals in similar matters.

#### B. *The Bank Board Case.*

The Court of Appeals was also clearly correct in dismissing for want of merit, petitioners' application for review of the Bank Board Order approving Prudential's plan of conversion.

The gravamen of petitioners' challenge to the Prudential conversion plan was the assertion that the July 13, 1972, eligibility record date for stock distribution was unfair to those persons who opened new accounts, or increased their deposits with the association after that date. Secondarily, petitioners challenge the "free stock" aspect of the conversion plan as inherently inequitable. As the Court of Appeals found, however, that particular record date was Congressionally-mandated for the Prudential plan after careful consideration and a finding that it was fair and equitable. Furthermore, the Congress specifically authorized *Prudential's* "free stock" distribution plan as an "experimental" tool, finding it equitable under the specific circumstances after intense scrutiny and debate.

The legislative history on this matter is clear. The Senate specifically recognized and intended that Prudential's conversion plan be approved as a free stock distribution, so long as that plan met all of the other requirements of the Bank Board conversion regulations. (Rpt. No. 93-902 on H.R. 11221 of the Senate Committee on Banking, Housing and Urban Affairs, 93d Cong., 2d Sess., at p. 5 (June 4, 1974).) Section 105 of the Amendments to and Extensions of Provisions of Law Relating to Federal Regulation of Depository Institutions, P.L. 93-495, amending Section 402(j)(2) of the National Housing Act, expressly provides that under certain conditions, all of which applied to Prudential and were known by Congress to apply specifically to Prudential, a mutual savings and loan association could convert to a stock association on the basis of a free stock distribution:

Each of these associations [First Federal Savings & Loan Association of Phoenix, Arizona; *Prudential Federal Savings of Salt Lake City, Utah*; and Tucson Federal Savings & Loan Association of

Tucson, Arizona] would be allowed to convert under the free distribution procedure. *These associations had taken certain public actions*, provided for in this section, regarding plans of conversion adopted by them and submitted to the Board prior to May 22, 1973. *These public actions have given rise to reliance and expectations on the part of the accountholders of those associations, and the Committee does not believe it is appropriate for the Congress to frustrate these expectations.* (Senate Rpt. No. 93-902, *supra* at 5.) (emphasis added)

This fact was also confirmed in the Joint Committee Report concerning this legislation. As explained in that report, "the House accepted the Senate provision" and with amendments allowed Prudential and certain other associations to convert under a free stock distribution plan. The pertinent portion of the report reads:

The House accepted the Senate provisions with an amendment directing the Corporation to process to final determination the applications of those associations having submitted plans of conversion prior to May 22, 1973. Those associations which had provided written public notice to accountholders of adoption of a plan for conversion *shall* be permitted to proceed without the requirement of a payment for stock distribution to accountholders as of a record date prior to the date of such notice, and under regulations and procedures in effect at the time of submission wherever necessary. (Conference Rpt. to H.R. 11221, 120 Cong. Rec. H. 9943, Oct. 4, 1974.) (emphasis added)

The use of the term "shall" in the Conference Report was considered by the Bank Board to be an explicit Congressional "command" to permit a free stock distribution (if Prudential's conversion plan was approved), "to accountholders as of a record date prior to the date of such notice." (Respondent Bank Board's Brief at 30 in the *Bank Board* case.)

The legislative history of P.L. 93-495 reflects that Congress had sound and compelling reasons for imposing an early eligibility record date for the free stock distribution by Prudential. In its reports, *supra*, the Senate expressly acknowledged "reliance and expectations" on the part of Prudential's account holders. Those expectations had been created by the announcement of Prudential's conversion plan, in its notice to account holders of August 10, 1972, which stated:

Deposits or withdrawals from savings accounts after the July 13, 1972 distribution record date will not affect the number of shares which a savings account holder will be entitled to receive upon conversion. (C.A. Rec. 46.)

Thus, Congress, in enacting the Section 402(j)(2) provision limiting free stock distribution only to account holders as of a record date prior to the date of such public notice, unmistakably intended that Prudential's account holders who withdrew their savings in reliance upon the August 10, 1972, public notice would receive free conversion stock in accordance with their "expectations."

Congress explained a second reason for the Section 402(j)(2) record date respecting eligibility for free conversion stock distribution. The Senate Committee on Banking, Housing and Urban Affairs indicated that the "grandfathered" conversions of Prudential and the two other similarly situated savings and loans would "offer Congress a further opportunity to examine what occurs when savings and loan associations are allowed to convert under a free distribution procedure." The Committee wished to allow such experimentation only to the extent "consistent with . . . rights not only of the converting institution but also of other institutions affected by such conversion." (Senate Rpt. No. 93-902, at 4.) Senator Proxmire explained:

The free distribution plan would have a disruptive effect on the savings and loan industry. Once the possibility of conversion became widely known, depositors would shift their money from association to association in anticipation of the windfall distributions accruing from the conversion process. Because of the pressures brought by depositors, mutual associations would be forced to convert whether they wanted to or not. The structure of the entire savings and loan industry could thus be radically transformed in a relatively short period of time. (Senate Rpt. No. 93-902, at 25.)

This is precisely what petitioners in this case have attempted to do. After announcement on August 10, 1972, of the proposed free conversion plan, certain of the petitioners deposited additional sums into their accounts at Prudential, arguably, in Senator Proxmire's words, in "anticipation of the windfall distributions accruing from the conversion process." Had the Act or the Bank Board permitted Prudential to use a more current record date for its free stock distribution, as petitioners urged, the conversion would have been subject to the very evils, *i.e.*, shifting of funds, "windfall" distributions, etc., condemned by Senator Proxmire and the Senate Banking Committee.

The legislative history and the language of the Act itself compel the conclusion that Congress plainly intended to allow free stock conversions in the case of savings and loan associations which, like Prudential, had (1) submitted their plans of conversion to the Board prior to May 22, 1973; (2) given written public notice of the contemplated conversion to their account holders prior to May 22, 1973; and (3) limited the distribution to account holders of a record date prior to the date of such public notice. Thus, if Prudential were to proceed with its plan of con-

version on the basis of a free stock distribution, it had to maintain a distribution record date prior to the date of written public notice, *i.e.*, prior to August 10, 1972.

Petitioners further challenged the Bank Board's approval of the Prudential plan on the grounds that proxy materials which the Bank Board had authorized Prudential to use were misleading. After a review of the materials, however, the Court of Appeals found no omission or misleading statement sufficient to warrant judicial modification of the plan. (Pet. App. A-17.)

The Bank Board was required by statute to approve not only the conversion plan, but the proxy material, and this is precisely what the Bank Board did. Petitioners' contention that the proxy solicitation material was misleading simply ignores the fact that the proxy statement in its entirety was reviewed by the Bank Board and approved by it for use. In fact, certain portions of it, specifically those dealing with the history of the proposed plan, were written by the Bank Board, which would not accept any substitute language. Virtually all of the material contained in the proxy statement was *required* under the Bank Board regulations. (*See, e.g.*, 12 C.F.R. 563b.)

Although petitioners challenged in a number of instances the words used in the proxy solicitation, they never argued that the statements made were untrue. Petitioners' allegations with respect to the proxy statement were simply insupportable. A few examples will be provided for illustrative purposes only.

First, petitioners argued that the proxy statement was misleading because it stated that the conversion stock would be distributed "*principally* to holders of savings accounts in Prudential Federal as of July 13, 1972," when

in fact "the plan provides that *only* savings accountholders as of July 13, 1972 will receive the stock" (P. Br., at 41;<sup>6</sup> emphasis in original text). The proxy statement is correct. Except for directors and principal officers of Prudential, savers received free stock based only upon their July 13, 1972 account balances. The use of the qualifying word "principally" in the proxy statement had obvious and exclusive reference to Prudential's directors and chief officers since distribution of free stock to them was based on their savings account balances as of July 20, 1970 (the date Prudential's directors first considered a plan of conversion), *if the July 20, 1970, balances were less than their savings balances as of July 13, 1972* (C.A. Rec. 992, 995). As noted earlier, this restrictive measure was added to prevent insiders from increasing their savings balances in expectation of conversion. Petitioners could have no legitimate complaint about this protective and salutary feature.

Second, petitioners contended that the proxy statement did not disclose management's personal interest in the conversion (P. Br., at 36). The contention was false. Management received only 1,321 shares of the 2,552,000 free shares of conversion stock issued by Prudential, and this was fully disclosed in the proxy statement. (C.A. Rec. 998.)

Third, petitioners alleged that the proxy statement was somehow misleading because it stated that the conversion stock was "non-assessable" (P. Br., at 41). They also asserted that the proxy solicitation material was "false" because it stated "all [conversion] stock will be distributed without cost," when, in fact, it cost the savings and loan \$860,000 to develop and implement the

<sup>6</sup>"P. Br." refers to petitioners' brief in the *Bank Board* case.

plan of conversion (P. Br., at 43). The use of the term "non-assessable" in the proxy statement was both appropriate and necessary. The nonassessability of financial institution stock is a standard disclosure given the now outdated, but still feared, practice of requiring assessments of financial institution stockholders to meet any deficits of the savings and loan. Moreover, the use of the words "without cost" was taken completely out of context by petitioners. It was used solely to inform the persons receiving the conversion stock that such stock would be "without cost to them" (C.A. Rec. 992; emphasis added). The proxy statement made full disclosure of the cost of the conversion to Prudential (Page 16 of the proxy statement, C.A. Rec. 997).

Finally, petitioners contended that the proxy statement was misleading because it used confusing and inconsistent terminology, such as "member" and "eligible accountholder," to describe the persons whose vote was being solicited. (P. Br., at 41). The short answer to this contention was that the terms used by Prudential were those employed by the Board in its conversion regulations. (See, 12 C.F.R. 563b.2 "Definitions.")

Petitioners' real complaint was clearly not with the proxy statement itself, but rather with the Board's conversion regulations on which the proxy statement was based. Those very regulations, however, provide that the Board can grant the following "remedial measures" if the solicitation of proxies by management violates the Board's regulations:

- (i) Correction of any such violation by means of a retraction and new solicitation;
- (ii) Rescheduling of the meeting for a vote on the conversion; and

- (iii) Any other actions which the Corporation may deem appropriate in the circumstances in order to ensure a fair vote. (12 C.F.R. 563b.5(g)(3).)

It is significant that petitioners at no time petitioned the Board for any relief specified in 12 C.F.R. 563b.5(g)(3). Apparently, petitioners were not interested in correcting an allegedly inaccurate proxy, but, rather, were seeking to exploit the conversion for their own monetary gain.

As the Court of Appeals stated in its decision:

We have examined the points and the record carefully and we find no omission or misleading statement sufficient to warrant the relief requested. (Pet. App. A-17.)

That factual determination was clearly appropriate, but again, it is important to emphasize in light of petitioners' brief to this Court requesting a writ of certiorari, that the Court of Appeal's holding was nothing more than a factual determination. The Court below did not hold, as petitioners suggest, that there is no private right of action for valid assertions of fraud in the proxy materials used in conjunction with a Bank Board-approved conversion plan.

### III. THE PRUDENTIAL MUTUAL-TO-STOCK CONVERSION PLAN IS UNIQUE; CONSEQUENTLY, A WRIT OF CERTIORARI IS UNWARRANTED.

Finally, it should be reiterated that the Prudential conversion plan involved a unique situation arising out of the special "grandfather" privileges granted by Congress to a very limited number of savings and loan associations to convert from a mutual to a stock form of organization under a plan for "free stock" distribution. Of the

few savings and loan associations authorized by Congress to implement such conversion plans, *only* Prudential has done so. Consequently, the circumstances presented by the instant petition lack the requisite "broad impact" (Pet. 25), which is necessary to warrant review by this Court.

# CONCLUSION

The Writ should be denied.

DATED this 9th day of December, 1977.

Respectfully submitted,

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Association*

IN THE SUPREME COURT OF THE UNITED STATES

JEANNE HARR and L.J. HARR  
for and on behalf of themselves  
and all others similarly situ-  
ated,

Petitioners,

v.

PRUDENTIAL FEDERAL SAVINGS  
AND LOAN ASSOCIATION,

Respondent.

L. J. HARR, JEANNE HARR, LAWRENCE  
J. ECHOHAWK, ED FULTON, DIANE  
FULTON, DON HUTCHISON, C. GERALD  
PARKER, DONALD DREW, CARRIE DREW,  
and DOUGLAS MCGREGOR,

Petitioners,

v.

FEDERAL HOME LOAN BANK BOARD,  
an agency of the United States,

Respondent.

ON PETITION FOR A WRIT  
OF CERTIORARI TO THE  
UNITED STATES COURT OF  
APPEALS FOR THE TENTH  
CIRCUIT

October Term, 1977  
No. 77-587

CERTIFICATE OF SERVICE  
OF BRIEF OF PRUDENTIAL  
FEDERAL SAVINGS AND LOAN  
ASSOCIATION IN OPPOSITION

The undersigned attorney, who is a member of the  
bar of this Court, hereby certifies, pursuant to Rule 33 of  
the Rules of the Supreme Court of the United States, that on  
this 7th day of December, 1977, three copies of the attached  
Brief of Prudential Federal Savings and Loan Association In

Opposition to Petition for a Writ of Certiorari were duly  
served on each of the following parties:

(1) On the Petitioners, by serving their  
attorneys of record by hand delivery as follows:

Parker M. Nielson  
Howard S. Landa  
318 Kearns Building  
Salt Lake City, Utah 84101

and

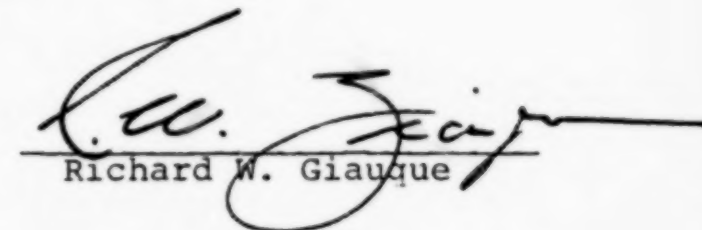
A. Reed Reynolds  
920 Kearns Building  
Salt Lake City, Utah 84101

(2) On the Respondent, Federal Home Loan  
Bank Board, by depositing same in the U.S. Mail,  
airmail, postage prepaid, addressed to:

Solicitor General  
Department of Justice  
Washington, D.C. 20530

and

Federal Home Loan Bank Board  
320 First Street, N.W.  
Washington, D.C. 20552  
Attn: Daniel J. Goldberg  
Acting General Counsel

  
Richard W. Glauque